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8 Proposed Counsel for Debtor,  
9 MedCision, LLC

10 UNITED STATES BANKRUPTCY COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 In re:

14 MedCision, LLC,  
15 *f/k/a BioCision, LLC,*

16 Debtor.

Case No. 17-31272

Chapter 11

**DEBTOR'S APPLICATION FOR  
ENTRY OF AN ORDER  
AUTHORIZING THE  
RETENTION OF KYLE EVERETT OF  
DEVELOPMENT SPECIALISTS, INC.,  
AS ITS CHIEF RESTRUCTURING  
OFFICER**

17 Date: March 22, 2018  
18 Time: 10:00 a.m.  
19 Judge: Hon. Hannah L. Blumenstiel  
20 Place: 450 Golden Gate Avenue  
21 16<sup>th</sup> Floor, Courtroom 19  
22 San Francisco, CA 94102  
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1 MedCision, LLC, the debtor and debtor-in-possession in the above captioned  
2 chapter 11 case (“MedCision” or the “Debtor”), applies, pursuant to sections 105 and 363  
3 of title 11 of the United States Code (the “Bankruptcy Code”), for entry of an order  
4 approving the employment of Kyle Everett of Development Specialists, Inc. (“DSI”) as  
5 Chief Restructuring Officer (“CRO”) of the Debtor, together with such additional DSI  
6 employees deemed required by the CRO, pursuant to the terms described in the  
7 engagement letter between the Debtor and DSI (the “Engagement Letter”). This  
8 application (the “Application”) is based on the concurrently filed Declaration of Kyle  
9 Everett (the “Everett Declaration”), other relevant papers of record, and upon such further  
10 oral and documentary evidence as may be presented in connection with this Application.  
11 A true and correct copy of the Engagement Letter is attached to the Everett Declaration.

12 In support of this Application, the Debtor respectfully represents as follows:

13 **INTRODUCTION**

14 By the Application, the Debtor seeks the retention of Mr. Everett as its CRO. While  
15 the Debtor believes it has the authority to employ an officer, such as a CRO, in the  
16 ordinary course, it is seeking Court approval under section 363 of the Bankruptcy Code.  
17 While the Debtor is employing Mr. Everett personally as its CRO, any compensation is to  
18 be paid to DSI, because DSI is effectively loaning Mr. Everett to the Debtor. Such an  
19 arrangement (i.e., where an individual is employed by the Debtor but compensation is paid  
20 to another entity) is arguably not ordinary course and may require approval under Section  
21 363 of the Bankruptcy Code.

22 In addition, while the Debtor is not seeking to retain Mr. Everett as a professional, it  
23 has provided below, as supported by the Everett Declaration, the discussion describing the  
24 disinterestedness of Mr. Everett and DSI. This discussion is provided to address potential  
25 questions, if any, that the U.S. Trustee and other parties in interest in may have in  
26 evaluating this Application.

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1 **BACKGROUND**

2 On December 20, 2017 (the “Petition Date”), the Debtor filed a voluntary petition  
3 for relief pursuant to chapter 7 of the Bankruptcy Code. By Order dated February 16, 2018  
4 (the “Conversion Date”), the Debtor’s case was converted to chapter 11 of the Bankruptcy  
5 Code (the “Chapter 11 Case”). By that same order, Kyle Everett of DSI was appointed as  
6 CRO of the Debtor on an interim basis, subject to this application for retention under  
7 section 363 of the Bankruptcy Code. The Debtor continues to operate its business as a  
8 debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No  
9 official committee has been appointed by the Office of the United States Trustee.

10 A detailed discussion of the Debtor’s background, capital structure, and the events  
11 leading to this bankruptcy filing is set forth in the declaration of Rolf Ehrhardt filed in  
12 support of the Debtor’s Motion to Convert its Case to Chapter 11 [Docket No. 9-1]. The  
13 discussion contained therein is incorporated in this Application as though fully set forth  
14 herein.

15 **RELIEF REQUESTED**

16 The Debtor requests the entry of an order, substantially in the form attached to this  
17 Application as Exhibit “A”, authorizing it to employ Mr. Everett as the Debtor’s CRO in  
18 connection with the above-captioned bankruptcy case, effective as of the Conversion Date,  
19 pursuant to the terms of the Engagement Letter.

20 The relief requested is necessary to the successful administration of the bankruptcy  
21 case. The Debtor requires the services of an experienced CRO and crisis manager in order  
22 to guide the company through a sale process and a successful resolution of this chapter 11  
23 case.

24 The Debtor has determined that it is in the best interest of its estate to retain an  
25 independent CRO for the Debtor. The Debtor believes that the employment of a CRO is  
26 necessary for evaluating strategic alternatives, communicating with the Debtor’s  
27 stakeholders, providing analysis regarding anticipated purchase offers, and making other  
28 business decisions for the Debtor.

1 **QUALIFICATIONS**

2 Mr. Everett is senior managing director of the San Francisco office of Development  
3 Specialists, Inc. Prior to joining DSI in 2002, he was a partner in a local insolvency  
4 consulting firm. His practice consists of consulting with debtors and creditors in  
5 bankruptcy, turnaround and workout assignments and forensic accounting and related  
6 analyses and testimony. He has served in numerous fiduciary capacities including state and  
7 federal court receiver, chapter 11 and chapter 7 trustee, CRO, assignee for the benefit of  
8 creditors, post judgment receiver, examiner, creditors' trust trustee, liquidator and  
9 disbursing agent.

10 Mr. Everett's expertise includes forensic accounting, analysis and evaluation of  
11 performance and profitability, development of budgets and forecasts, crisis management  
12 and negotiations with creditors and lenders. He has testified as an expert in state court,  
13 bankruptcy court and arbitration.

14 Mr. Everett has worked with clients in a wide range of industries including apparel  
15 manufacturing, legal and accounting firms, retail, real estate, timber harvesting, hospitality,  
16 health care, restaurants, automobile dealerships, pleasure boat and yacht manufacturers,  
17 equipment and furniture manufacturing, outdoor advertising, oil bunkering and health  
18 clubs.

19 Mr. Everett is a California certified public accountant and received his Bachelor of  
20 Science degree in Business Administration from California State University Northridge in  
21 1981. He is a member of the American Bankruptcy Institute, California Bankruptcy Forum  
22 and is also the past president of both the Bay Area chapter and the state chapter of the  
23 California Receivers Forum. He is a member of the American Institute of Certified Public  
24 Accountants (AICPA); and the Association of Insolvency & Reorganization Advisors  
25 (AIRA).

26 **SERVICES TO BE RENDERED**

27 Subject to Court approval, Mr. Everett will serve as the CRO for the Debtor, to  
28 evaluate and implement strategic and tactical options through a restructuring and sale

1 process and exercise his business judgment on behalf of the Debtor. The CRO will work  
2 with the Debtor's directors, employees and other professionals to do the following on  
3 behalf of the Debtor:

4 a. Determine if the retention of an investment banker is warranted and if so  
5 retain them subject to Bankruptcy Court approval and a budget.

6 b. Determine if the retention of other professionals is warranted and if so, retain  
7 them subject to Bankruptcy Court approval and a budget.

8 c. Develop strategies to improve cash flows and reduce expenses.

9 d. Identify all potential purchasers of the Company and complete a sale of the  
10 Company's assets.

11 e. Provide reports to the Company's secured lender, creditor constituencies and  
12 board of directors.

13 f. Prepare and file all necessary reports required by the Court and the United  
14 States Trustee.

15 g. Create and comply with budgets.

16 h. Amend or terminate leases and contracts.

17 i. Comply (directly or through an investment banker) with due diligence  
18 requests from prospective business/asset acquirers.

19 j. Develop and implement cash management strategies, tactics and processes.

20 k. Such other matters as may be necessary in connection with this case.

### 21 **COMPENSATION**

22 Subject to Court approval as an administrative expense in accordance with section  
23 503 of the Bankruptcy Code, the Debtor and Mr. Everett have agreed to the following  
24 proposed compensation and payment:

25 a. Hourly Fee: The Debtor has agreed to pay the CRO at the rate of \$595 per  
26 hour subject to a \$30,000 monthly rolling maximum on fees billed each month (the  
27 "Monthly Cap"). If the CRO incurs fees during any specific month that exceed the  
28 Monthly Cap, the amount of such excess fees will be carried over and billed in the

1 following month(s). If the CRO incurs fees that are less than the Monthly Cap, any unused  
2 portion of the Monthly Cap may be added to the Monthly Cap in subsequent months.

3 In addition, the CRO will be entitled to receive reimbursement for reasonable costs  
4 and expenses incurred in connection with this engagement, up to a rolling maximum of  
5 \$500.00 per month. Such costs and expenses may include, among others, charges for  
6 messenger services, overnight deliveries, photocopying, travel expenses, long distance  
7 telephone charges, postage and other charges customarily invoiced by consulting firms.

8 Also, as the CRO, Mr. Everett, and members of DSI involved in this matter, shall be  
9 entitled to all indemnities provided to officers of the Debtor pursuant to the Debtor's by-  
10 laws and articles of incorporation. Further, Mr. Everett, in his capacity as CRO, and to the  
11 extent allowable or available, DSI, will be entitled to coverage under the Debtor's  
12 applicable insurance coverage for the benefit of officers of the Debtor.

### 13 **GENERAL DISINTERESTEDNESS**

14 Although the Debtor does not propose to retain Mr. Everett under section 327 of the  
15 Bankruptcy Code, the CRO has nonetheless performed a computerized conflict check and,  
16 to the best of his knowledge and except to the extent disclosed in the Everett Declaration,  
17 does not hold any interest adverse to the interests of the Debtor's estate.

18 Further, by the Everett Declaration, Mr. Everett provides full and complete  
19 disclosure in order to demonstrate the satisfaction of all requirements that would be  
20 imposed by the Bankruptcy Code and Bankruptcy Rules for employment in this case.

21 The CRO has agreed not to share with any person or entity any compensation  
22 received by it in the Debtor's case, except as among the members, associates, and  
23 employees of DSI. Neither DSI, nor any of its principals, employees, agents or affiliates  
24 has any connection with the Debtor, its creditors, the United States Trustee, the Bankruptcy  
25 Judge or any other party with an actual or potential interest in the bankruptcy case or its  
26 attorneys or accountants, except as set forth in the Everett Declaration.

27 DSI personnel and their family members may have business associations with  
28 certain creditors of the Debtor unrelated to the bankruptcy case. The Debtor maintains

1 business relationships with several creditors and other parties. DSI may have advisory or  
2 other commercial or professional relationships with such entities or persons completely  
3 unrelated to the Debtor or its business affairs. No such relationships are in any way related  
4 to the bankruptcy case. Additionally, in the ordinary course of its business, DSI may  
5 engage counsel or other professionals in unrelated matters who now represent, or who may  
6 in the future represent, the Debtor, creditors, or other interested parties in the bankruptcy  
7 case. Currently the following professional relationships exist between members of DSI and  
8 other professionals involved or proposed to be involved in this case.

- 9       • Diamond McCarthy represents Mr. Everett as the chapter 7 trustee in the  
10       matter *In re* Exigen (USA), Inc.; Case No. 13-32281 DM, U.S. Bankruptcy  
11       Court Northern District, San Francisco Division;
- 12       • Diamond McCarthy represents Mr. Everett in an unrelated receivership; Case  
13       No. 8:15-cv-01449-JLS-KESx, U.S. District Court, Central District of  
14       California.
- 15       • DSI is the financial advisor to Allan Diamond of Diamond McCarthy who is  
16       the Chapter 7 Trustee for Howrey, LLP; Case No. U.S. Bankruptcy Court,  
17       Northern District, San Francisco Division.
- 18       • Diamond McCarthy is special litigation counsel for Appalachian Fuels, LLC  
19       Creditors' Trust, where DSI is the Creditors' Trust Trustee; Case No. 09-  
20       10343 U. S. Bankruptcy Court Eastern District of Kentucky, Ashland  
21       Division.
- 22       • Diamond McCarthy is litigation counsel for a related entity of DSI that is the  
23       Assignee in an unrelated Assignment for the Benefit of Creditors.
- 24       • Diamond McCarthy is special litigation counsel to a member of DSI who  
25       was appointed as Liquidation and Lender Trustee for the post confirmation  
26       Debtor in the matter of *In re* Syntax-Brilliant Corporation, et al.; Case No. 08-  
27       11407 (BLS), U.S. Bankruptcy Court, District of Delaware.

- 1 • Diamond McCarthy is special litigation counsel to the Debtor in the matter  
2 *In re* Equipment Acquisition Resources, Inc., where a member of DSI is the  
3 CRO; Case No. 09-39937; U.S. Bankruptcy Court, Northern District of  
4 Illinois, Eastern Division.
- 5 • Sheppard Mullin is litigation counsel for a related entity of DSI that is the  
6 Assignee in an unrelated Assignment for the Benefit of Creditors.
- 7 • Sheppard Mullin is a creditor in and Assignment for the Benefit of Creditors  
8 where an affiliate of DSI is the Assignee.
- 9 • Sheppard Mullin represents Mr. Everett as Chapter 7 Trustee in the matter of  
10 *In re* Pacific Metro, LLC; Case No. 10-55788, U.S. Bankruptcy Court,  
11 Northern District of California, San Jose Division.
- 12 • The Law Office of Finestone & Hayes represents a related entity of DSI that  
13 is the Assignee in an unrelated Assignment for the Benefit of Creditors.

14 If the CRO discovers additional information that requires disclosure, the CRO will  
15 file a supplemental disclosure with the Court.

16 The CRO has not been retained to assist any entity or person other than the Debtor  
17 on matters relating to, or in connection with, the bankruptcy case. If this Court approves  
18 the proposed employment of the CRO by the Debtor, the CRO will not accept any  
19 engagement or perform any services for any entity or person other than the Debtor in the  
20 bankruptcy case. The CRO (and DSI) will, however, continue to provide professional  
21 services to, and engage in commercial or professional relationships with, entities or  
22 persons that may be creditors of the Debtor or parties in interest in the bankruptcy case,  
23 provided, however, that such services do not relate to, or have any direct connection with,  
24 the bankruptcy case.

25 The Debtor does not owe the CRO any amount for services performed or expenses  
26 incurred prior to the Petition Date or the Conversion Date and thus the CRO is not a  
27 prepetition creditor of either Debtor.

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1 Further, pursuant to Section 1107(b), a professional is not disqualified from  
2 employment under Section 327 (referred to by analogy here) on grounds that such  
3 professional was employed by a debtor prior to commencement of a bankruptcy  
4 proceeding.

5 Accordingly, although not required for approval of the present engagement, the  
6 Debtor believes that Mr. Everett is a “disinterested person” as defined in section 101(14)  
7 of the Bankruptcy Code.

### 8 **BASIS FOR RELIEF**

9 Section 363 of the Bankruptcy Code provides, in relevant part, that a debtor in  
10 possession “after notice and a hearing, may use, sell or lease, other than in the ordinary  
11 course of business, property of the estate.” 11 U.S.C. § 363(b). Under applicable case law  
12 in this and other circuits, if a debtor’s proposed use of its assets pursuant to section 363(b)  
13 of the Bankruptcy Code represents a reasonable business judgment on part of the debtor,  
14 such use should be approved. See In re 240 North Brand Partners, 200 B.R. 653, 659  
15 (B.A.P. 9th Cir. 1996) (citing In re Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983)).

16 Bankruptcy courts have analyzed the propriety of a debtor’s employment of  
17 corporate restructuring officers, advisors and professionals under section 363 on numerous  
18 occasions and have determined it is an appropriate exercise of the debtor’s business  
19 judgment to employ a restructuring professional in this manner. See, e.g., In re Colad  
20 Group Inc., 324 B.R. 208, 215 (Bankr. W.D.N.Y. 2005); In re PopExpert, Inc., (Case No.  
21 16-30390 HB) (Bankr. N.D. Cal. June 6, 2016); In re NewZoom, Inc., (Case No. 15-  
22 31141-HB) (Bankr. N.D. Cal. Jan. 20, 2016); In re Siliken Manufacturing USA, Inc., Case  
23 No. 13-00119-CL11 (Bankr. S.D. Cal. Mar. 19, 2013); In re Am. Suzuki Motor Corp.,  
24 Case No. 8:12-bk-22808-SC (Bankr. C.D. Cal. Dec. 10, 2012); In re Fifth Avenue  
25 Partners, LLC, Case No. 8:10-bk-18667-ES (Bankr. C.D. Cal. Aug. 5, 2010); In re  
26 Westcliff Med. Labs., Inc., Case No. 10-16743 (Bankr C.D. Cal. June 25, 2010).

27 Additionally, the Court’s general equitable powers codified in section 105(a) of the  
28 Bankruptcy Code provide ample authority for the relief requested herein. Section 105(a) of

1 the Bankruptcy Code empowers the court to “issue any order, process, or judgment that is  
2 necessary to carry out the provisions of this title.” See 11 U.S.C. § 105(a); see also United  
3 States v. Energy Resources Co., 495 U.S. 545, 549 (1990); Rosson v. Fitzgerald (In re  
4 Rosson), 545 F.3d 764 (9th Cir. 2008); Martin v. United States (In re Martin), 150 B.R. 43,  
5 47 (Bankr. S.D. Cal. 1993) (noting the Court’s “broad” powers under Section 105).

6 The terms and conditions of the CRO’s retention were negotiated by the Debtor and  
7 the CRO at arm’s length and in good faith. The Debtor submits that the employment of Mr.  
8 Everett is a sound exercise of its business judgment and satisfies section 363 of the  
9 Bankruptcy Code. The CRO’s services are necessary and essential to the Debtor’s  
10 restructuring efforts. Mr. Everett has extensive experience providing services to distressed  
11 companies, including in connection with assisted asset sales. Mr. Everett is qualified for  
12 the position for which he is being employed. The Debtor has determined that the terms of  
13 the engagement of the CRO are within the range of those for senior executive officers  
14 employed with the companies of comparable size, value and reputation. Accordingly, the  
15 Debtor’s decision to employ the CRO reflects an exercise of the Debtor’s sound business  
16 judgment.

### 17 CONCLUSION

18 WHEREFORE, the Debtor respectfully requests this Court enter an Order,  
19 substantially in the form attached to hereto as Exhibit “A”, approving the retention of Mr.  
20 Everett as CRO for the Debtor effective as of the Conversion Date, subject to the terms set  
21 forth in this Application, and for such other and further relief as may be just and proper.  
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1 Dated: February 22, 2018

2 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

3  
4 By /s/ J. Barrett Marum

5 ORI KATZ

6 J. BARRETT MARUM

7 MICHAEL LAUTER

8 Proposed Counsel for Debtor, MedCision, LLC

1 **EXHIBIT A**

2 SHEPPARD, MULLIN, RICHTER &  
3 HAMPTON LLP

4 A Limited Liability Partnership  
5 Including Professional Corporations

6 ORI KATZ,

7 Cal. Bar No. 209561

8 J. BARRETT MARUM,

9 Cal. Bar No. 228628

10 MICHAEL M. LAUTER,

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19 Proposed Counsel for the Debtor,  
20 MedCision, LLC

21 UNITED STATES DISTRICT COURT  
22 NORTHERN DISTRICT OF CALIFORNIA  
23 SAN FRANCISCO DIVISION

24 In re:

25 MedCision, LLC

26 *f/k/a BioCision, LLC,*

27 Debtor.

Chapter 11

Case No. 17-31272

**[PROPOSED] ORDER AUTHORIZING  
THE RETENTION OF  
KYLE EVERETT OF DEVELOPMENT  
SPECIALISTS, INC. AS ITS CHIEF  
RESTRUCTURING OFFICER**

Hon. Hannah L. Blumenstiel

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3       The *Application for Entry of order Authorizing the Retention of Kyle Everett of*  
4 *Development Specialists, Inc. As its Chief Restructuring Officer* (the “Application”), filed by  
5 debtor and debtor-in-possession, MedCision, LLC (the “Debtor”) on February \_\_, 2018 as  
6 Docket No. \_\_\_\_\_, came before the Court for consideration. Based upon the Court’s review  
7 of the Application, the declarations and other pleadings filed in support of the Application, and all  
8 pleadings and evidence of record in this case.

9       IT IS HEREBY ORDERED THAT:

10       1.     The Application is GRANTED. Capitalized terms not defined in this Order shall  
11 have the meanings given to them in the Application.

12       2.     The terms of the Engagement Letter are approved. The Debtor is authorized to  
13 employ, as of the Conversion Date, Kyle Everett, as a Chief Restructuring Officer for the Debtor  
14 on the terms set forth in the Engagement Letter and in the Application.

15                               **\*\* END OF ORDER \*\***  
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Court Service List

None.